NOTES OF CASES.

Deeds—Exception of Timber and Coal for Personal Use.—In Bates *v.* Gayheart, 205 S. W. 559, the court of appeals of Kentucky construed a deed conveying land, "except any timber and coal upon said land that the party of the first part may want to use during his lifetime," to except only such timber and coal as the grantor might desire for personal use during his lifetime, and not such as he might desire to sell.

The court said: "In support of the judgment below it is argued that the title to all the coal and timber that the grantor might desire to use for his personal purposes, or to sell and dispose of to others, remained in him. In this connection we have been cited to the case of Whitaker *v.* Brown, 46 Pa. 197. There the reservation read as follows:

"'Saving and reserving, nevertheless, for his own use, the coal contained in the said piece or parcel of land, together with free ingress or egress by wagon road to haul the coal therefrom as wanted.'"

The grantee contended that it was only a special and temporary use of the coal that was reserved to the grantor, a right to use the coal during his life, but which ceased at his death. In discussing the question the court said:

"'We cannot so read the clause. "The coal contained in said piece or parcel of land" was the subject of the reservation. If that means less than the whole, how much less? What proportion of the coal was reserved? Words not larger than these were construed to mean the whole of a coal right in Caldwell *v.* Fulton, and we confess we should not know by what rule to restrict these words, if we felt called upon to impose a restriction where the parties imposed none. Do the words "for his own use" amount to a restriction? Sometimes the use is limited in point of duration, as while the grantee is tenant of a particular messuage, or so long as he manufactures a specific production; but here it is as general and absolute as so few words could make it. "For his own use" means, in such a reservation, the same dominion and proprietorship over the coal that he would have had if he had made no deed for the land. He held it for his own use in all the forms that it was capable of being used at the date of his deed; he held it just as absolutely after his deed was delivered.'

"In the case under consideration it is not necessary to imply that only the use of the coal during the grantor's lifetime was contemplated. This idea is clearly expressed in the excepting clause by the words 'that the party of the first part may want to use during his lifetime,' thus showing that the use referred to should last no longer than the grantor's lifetime. To sustain defendant's contention, we would have to hold that the use referred to extended beyond the life

of the grantor, and thus ignore the qualifying words in question, and give to the exception the same effect as if it had read, except all the timber and coal upon said land.' This we cannot do. Giving proper effect to the qualifying words, we conclude that only such coal and timber were excepted from the conveyance as the grantor might want for his personal use during his lifetime, and not such coal and timber as he might desire to sell to others. In other words, only a personal use by the grantor during his lifetime was contemplated, and not a salable use, which would continue in effect after his death."

Game—Fowling Rights of Riparian Owners on Navigable Waters. —In Schermerhorn *v.* Dozier (Cir. Ct. Appeals, Fourth Cir.), 251 Fed. 839, it was held that under Code Va. 1904, §§ 1338 and 1339, a riparian owner upon nontidal navigable waters of a bay, did not have exclusive right of fowling on its waters below low-water mark, as such waters may be used in common for fowling and fishing.

The court said: "The question, therefore, now presented, is as to the riparian rights of owners of land abutting upon navigable waters in the state of Virginia in respect to fowling on such waters. The following is from 2 Henning's Statutes at Large, p. 456, under date of April, 1679:

" 'Robert Liny haveing complained to this grand assembly, that whereas he had cleared affishing place in the river against his owne land to his greate cost and charge supposing the right thereof in himselfe by virtue of his pattents, yett neverthelesse severall persons have frequently obstructed him in his just priviledge of ffishing there, and in despight of him came upon his land and hale their sceanes on shore to his greate prejudice, aleadging that the water was the king majesties, and not by him gran ed away in any pattent, and therefore equally free to all his majesties subjects to ffish in and hale their sceanes on shore, and praying for reliefe therein by a declaratory order of this grand assembly; it is ordered and declared by this grand assembly that every mans right by virtue of his pattent extends into the rivers or creekes soe farre as low water marke, and it is a priviledge granted to him in and by his pattent, and that therefore noe person ought to come and ffish there above low water marke or hale their sceanes on shoare (without leave first obtained) under the hazard of committing a trespasse, for which he is sueable in law.'

"We know of no reason why the principle enunciated in the foregoing legislative declaration should not apply to fowling as well as to fishing in navigable waters. The modern form of this rule is found in § 1339, Code of Virginia 1904. Moreover, § 1338 of said Code (taken from Act April 1, 1873 [Acts 1872-73, p. 310]) reads, so far as material, as follows: